

Indemnity Provisions in Wisconsin Construction Contracts

Ross A. Anderson

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Ross A. Anderson, *Indemnity Provisions in Wisconsin Construction Contracts*, 60 Marq. L. Rev. 1083 (1977).
Available at: <http://scholarship.law.marquette.edu/mulr/vol60/iss4/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

INDEMNITY PROVISIONS IN WISCONSIN CONSTRUCTION CONTRACTS

Building and construction contracts frequently contain provisions requiring the subcontractor to indemnify the general contractor or the owner of the premises against any liability incurred during the performance of the contract. Although such provisions are generally upheld by the courts, problems arise when the general contractor or owner claims that the contractual indemnity clause indemnifies him from losses occasioned by his own negligence. The Wisconsin Supreme Court has dealt with this problem several times, but has been unable to clearly resolve the issue.

In most jurisdictions contracts indemnifying the indemnitee against his own negligence are not contrary to public policy,¹ although at least one state statute has declared such a provision to be "void" and "unenforceable."² Even when they are upheld by the courts, such clauses are usually strictly construed against the indemnitee, both because the contract is typically an adhesion contract drafted by the indemnitee and because the indemnitee seeks by means of the indemnification agreement to avoid liability for his negligent acts.³ On the other hand, some jurisdictions have adopted a more liberal test, construing the contract broadly to effectuate the intent of the

1. Annot., 27 A.L.R.3d 663 (1966); 50 MARQ. L. REV. 77 (1966); *United States v. Seckinger*, 397 U.S. 203, 211 (1970), which states:

[W]e agree . . . that a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American jurisdictions.

2. ILL. ANN. STAT. ch. 29, § 61 (Smith-Herd), reads:

With respect to contracts or agreements, either public or private, for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

3. *Auto Owners Mut. Ins. Co. v. Northern Ind. Pub. Serv. Co.*, 414 F.2d 192 (7th Cir. 1969); *Hardeman, Inc. v. Hass Co.*, 246 Ark. 559, 439 S.W.2d 281 (1969); *Florida Power & Light Co. v. Elmore, Fla.*, 189 So. 2d 522 (Fla. 1966); *Guernick v. Herlihy Co.*, 180 Neb. 839, 146 N.W.2d 211 (1966); *Massachusetts Bonding & Ins. Co. v. Westinghouse Elec. & Mfg. Co.*, 47 Ohio App. 2d 344, 72 N.E.2d 388 (1946), *appeal dismissed*, 148 Ohio St. 148, 73 N.E.2d 805 (1947).

parties, thus frequently permitting indemnification of the indemnitee.⁴

I. WISCONSIN CASE LAW

Wisconsin first construed a clause indemnifying the indemnitee for his own negligence in *Hartford Accident & Indemnity Co. v. Worden-Allen Co.*⁵ The plaintiff Hartford was the insurer of Seaman Body Corporation. Seaman contracted with Permanent Construction Company to erect a building, and Permanent subcontracted the structural steel work to the defendant Worden-Allen. The subcontract contained the following indemnity clause:

In accepting this order you agree to indemnify, reimburse and save harmless the owner and us of and from all loss and damage to person or property and all claims, suits or demands arising from damages or injuries to you and your employees, ourselves and our employees, the owner and his employees, other contractors and their employees, and the general public, due to, arising from, or connected with your operations on this job.⁶

An employee of Worden-Allen was injured when a crane came into contact with an uninsulated power line maintained by the owner Seaman. The injured employee recovered a judgment against Seaman⁷ which was paid by Hartford, Seaman's insurer. As a result, Hartford was subrogated to Seaman's rights and sued Worden-Allen, claiming that by the indemnity clause Worden-Allen agreed to hold harmless both Permanent and the owner Seaman. The Wisconsin court held that the defendant Worden-Allen was liable under the contract to indemnify Seaman because Worden-Allen's active negligence directly contributed to the employee's injuries, while Seaman's negligence was merely passive. However, in dicta the court also noted that if the employee's injuries had been caused solely by the negligence of Seaman, the indemnitee, Seaman would not be enti-

4. *Red Ball Motor Freight, Inc. v. Employer's Mut. Liab. Ins. Co.*, 189 F.2d 374 (5th Cir. 1951); *Grimshaw Co. v. Wright Elec. Co.*, 283 F. Supp. 628 (W.D. Tex. 1968); *Graver Tank Mfg. Co. v. Fluor Corp.*, 4 Ariz. App. 476, 421 P.2d 909 (1967); *Jacobsen v. Ravenhorst Corp.*, 301 Minn. 202, 221 N.W.2d 703 (1974); *Cozzi v. Owens Corning Fibre Glass Corp.*, 63 N.J. Super. 117, 164 A.2d 69 (1960).

5. 238 Wis. 124, 297 N.W. 436 (1941).

6. *Id.* at 127, 297 N.W. at 438.

7. *Criswell v. Seaman Body Corp.*, 233 Wis. 606, 290 N.W. 177 (1940).

tled to indemnification under the contract.

This dicta in *Hartford Accident* was crucial to the result in *Mustas v. Inland Construction Co.*⁸ The plaintiff, Mustas, an employee of one of the defendant Inland's subcontractors, slipped on an icy floor at the construction site and was injured. The trial court found Inland 100 percent negligent, but Inland maintained that two other subcontractors, F. Rosenberg Elevator Company and Westinghouse Electric Corporation, had agreed to indemnify the general contractor against his own negligence. Relying on *Hartford Accident*, the court recognized that to indemnify the indemnitee for his own negligence, even for the breach of nondelegable duties under the safe place statute is not contrary to public policy.⁹ Inland's contract with both subcontractors read:

The subcontractor assumes full responsibility and risk for any and all damage to person or property in the performance of the contract arising out of the assumed work, whether directly or indirectly, to be performed by said subcontractor, and does hereby agree to and shall hold the owner and contractor . . . free from, and harmless of and from, any and all claims for injury, including death . . . resulting from or arising out of, and in connection with, any of the subcontractor's operations . . . [and] agrees to forever hold, save and keep harmless and fully indemnify Inland and the owner . . . and the general public, of and from all liabilities, damages, claims, recoveries, costs, and expenses because of loss of or damage to property or injury to or deaths of persons in any way arising out of or in connection with the performance of this contract.¹⁰

Despite the general and comprehensive language of this provision, the court applied the majority view which strictly construes such clauses and held that since it did not "expressly provide" for such coverage, it did not permit indemnity for the indemnitee's own negligence.

In *Algrem v. Nowlan*,¹¹ faced with the mutual negligence of both the indemnitor and the indemnitee, the court qualified the rule of strict construction. In that case, an employee of the

8. 19 Wis. 2d 194, 120 N.W.2d 95 (1963).

9. *Id.* at 205, 120 N.W.2d at 101. See also Boden, *The Problem of Indemnity under the Safe-Place Statute*, 40 MARQ. L. REV. 349 (1957).

10. 19 Wis. 2d at 205-206, 120 N.W.2d at 101.

11. 37 Wis. 2d 70, 154 N.W.2d 217 (1967).

lessee of a building was injured when he slipped on accumulated ice. Although his recovery from the employer was limited to his worker's compensation award, he subsequently sued the owners of the building.

The owners claimed that an indemnification covenant in the lease obligated the lessee to indemnify the owners for losses sustained because of the negligent acts of the lessee in maintaining or repairing the premises. The court applied a broad rule of construction to uphold the owners' claim. The court also pointed out that it would apply a strict rule of construction to an indemnity clause requiring the lessee to indemnify the owners for any liability that might arise from structural defects or the owners' failure to repair. The court stressed that the rule of strict construction applies only when the indemnity clause covers the negligent acts of the indemnitee. This qualification is a natural outgrowth of the common law principle that a person should not be required to indemnify another against that party's negligent acts unless such an intention is expressed clearly and unequivocally in the indemnity agreement. By contrast, where an indemnitor contracts to indemnify against liability caused by his own negligent acts, a broad rule of construction is consistent with public policy. In fact, as the court noted, there is usually no real need for an express provision of indemnity in such a situation, since a common law right of indemnity generally exists.¹²

The court implicitly reasserted this distinction in *Young v. Anaconda American Brass*.¹³ In this case, Young, an employee of a subcontractor was injured on the defendant Anaconda's premises when he slipped on a patch of accumulated grease. The jury found Anaconda seventy percent negligent, the subcontractor twenty percent negligent, and the employee ten percent contributorily negligent. However, Anaconda claimed that it should be indemnified by the subcontractor as a result of an indemnity clause in the subcontract.¹⁴ Relying on *Algrem* and

12. 37 Wis. 2d at 78, 154 N.W. 2d at 220, citing *Hartford Accident & Indem. Co. v. Worden-Allen Co.*, 238 Wis. 124, 297 N.W. 436 (1941), and *Zulkee v. Wing*, 20 Wis. 429 (1866).

13. 43 Wis. 2d 36, 168 N.W.2d 112 (1969).

14. *Id.* at 53, 168 N.W.2d at 121-22. The indemnity clause provides: Contractor shall at all times indemnify and save harmless Anaconda American Brass Company on account of any and all claims, damages, losses, litigation, expenses, counsel fees and compensation arising out of any injury (including

Mustas, the court rejected this assertion and held that *Anaconda* was not contractually entitled to be indemnified for that portion of the recovery attributable to its own causal negligence because the contract did not expressly provide for such indemnification.

Algrem, *Mustas* and *Anaconda*,¹⁵ taken together, established the following rules of construction of an indemnity clause: first, the clause itself must be strictly construed, and, second, a contract seeking to indemnify an indemnitee against his own negligent acts must contain an express provision to that effect. After *Anaconda*, it appeared settled in Wisconsin that a contract containing an indemnity clause is governed by these two tests.

II. THE LEASE/INSURANCE PROBLEM

In spite of the strict construction tests adopted by *Algrem*, *Mustas* and *Anaconda*, the court adopted a more liberal rule of ascertaining contractual intent in leases with provisions requiring the indemnitor to purchase insurance. The first case to employ the more liberal construction was *Herchelroth v. Mahar*,¹⁶ a decision which was not cited in the *Anaconda* case. *Herchelroth* involved the lessor of a truck who agreed in the written lease to indemnify the lessee. The lease provided that "[t]he lessor agrees to secure and pay for property damage and public liability insurance on the leased equipment and save the lessee harmless from any damage thereby during the duration of this agreement."¹⁷ *Herchelroth*, the plaintiff, was injured when his car collided with the leased truck. The lessee, who was held one hundred percent negligent on a theory of respondeat superior, claimed full indemnification from the lessor by virtue of the lease. In turn, the lessor argued that since

death) sustained by, or alleged to have been sustained by, the servants, employees or agents of Anaconda American Brass Company or the Contractor, its subcontractors or materialmen, the public and its servants, employees or agents, any or all persons on or near the work, or any other person or arising out of loss or damage to any property, real or personal, if such injury or such loss or damage is caused in whole or in part by the acts or omissions of the Contractor, its subcontractors or materialmen, or anyone directly or indirectly employed by them or anyone of them while engaged in the performance of this contract.

15. *Anaconda*, *Mustas* and *Algrem* were followed in *Yaste v. American Motors Corp.*, 395 F. Supp. 529 (E.D. Wis. 1975).

16. 36 Wis. 2d 140, 153 N.W.2d 6 (1967).

17. *Id.* at 144-45, 153 N.W.2d at 8 (emphasis supplied).

the indemnity clause required him merely to procure public liability insurance, he need only indemnify the lessee for his failure to do so. The lessor also contended that the parties had not expressly agreed, as they did in *Mustas*, to indemnify the indemnitee against his own negligence.

The trial court agreed with the lessee's claim for indemnification despite the ambiguity of the lease provision, and the supreme court affirmed. While acknowledging Wisconsin's adherence to a strict rule of construction when the indemnitee seeks indemnification for his own negligence, the court nevertheless focused on the intent of the parties to distinguish this case from that in *Mustas*. Indisputably, the first clause in the *Herchelroth* indemnity provision required the lessor to procure insurance covering damages resulting from the lessee's negligent acts. However, the court stressed that if the second save-harmless clause was merely a reassertion of the reason for this purchase requirement, the clause would be independently meaningless and mere surplusage. As the court noted, the parties could not have intended this result. "The intent[ion] of the parties here was to affect in some way the . . . [indemnitee's] obligation to bear the cost of his negligent acts and . . . the dispute is . . . the extent to which the . . . [indemnitor] assumed that obligation."¹⁸ The court emphasized that the indemnitor was unable to show any purpose for the clause other than to assume responsibility for the indemnitor's own negligent acts. The *Herchelroth* indemnity clause was therefore distinguished from that in *Mustas* on the ground that while the *Mustas* clause had been overly broad, it was not wholly inoperative if interpreted not to require indemnification of the indemnitee for his own negligent acts.¹⁹

In a per curiam decision, *Hastreiter v. Karau Buildings*,²⁰ the court reaffirmed the holding in *Herchelroth*. In *Hastreiter*, the plaintiff tenant argued that an indemnification provision in his lease did not apply to the indemnitee landlord's negligence, and therefore, any liability incurred by the landlord's

18. *Id.* at 146, 153 N.W.2d at 9.

19. Such a construction of the contract is consistent with the rule cited in *Goldmann Trust v. Goldmann*, 26 Wis. 2d 141, 131 N.W.2d 902 (1965), which declared that an agreement should be construed to give a reasonable meaning to all provisions of the contract rather than a construction which leaves part of the language useless or creates a surplusage in the contract.

20. 57 Wis. 2d 746, 205 N.W.2d 162 (1973).

failure to install handrails should be borne by the landlord. The lease provided that "[t]he Lessee agrees to carry and pay for public liability insurance *and* to hold the Lessor harmless from any liability arising out of the occupancy of said leased premises by the Lessee."²¹

The court, citing only *Herchelroth*, held that the rule of strict construction announced in *Mustas* and *Anaconda* was simply a rule of construction to be used to ascertain the intent of the parties, and no more or less inviolate than any rule of construction aimed at giving meaning to all parts of the agreement.

Here, the court noted, the provision to procure public liability insurance was inserted to protect the indemnitee from liability sustained as a property owner. But such insurance would extend only to liability for structural defects or failure to repair, since any other liability terminated with the transfer of possession to the tenant.²² If the same save-harmless clause were construed merely as an explanation of the purpose for the insurance requirement, it would be surplusage. Thus, the save-harmless clause must properly be construed as protecting the indemnitee from the consequences of his own negligent acts.²³

III. CONSTRUCTION CONTRACTS REQUIRING INSURANCE

The *Herchelroth* and *Hastreiter* decisions both involved leases rather than construction contracts, but they served to confuse indemnity clause interpretation. These two cases, com-

21. *Id.* at 748, 205 N.W. 2d at 163 (emphasis supplied).

22. In support of the limits of the landlord's liability, the court cited *McNally v. Goodenough*, 5 Wis. 2d 293, 92 N.W.2d 890 (1958), and *Sheehan v. 535 North Water Street*, 268 Wis. 325, 67 N.W.2d 273 (1954).

23. Between the *Herchelroth* and *Hastreiter* decisions, the court decided another case involving a lease, *Baker v. McDel Corp.*, 53 Wis. 2d 71, 191 N.W.2d 846 (1971). The plaintiff brought suit against the lessor (eighty percent negligent) and the lessee (fifteen percent negligent). The lease provided:

Lessor . . . shall not be liable for any loss . . . resulting from lessee's use, possession or operation thereof . . . whether due in whole or in part to negligent action of lessor, its agents or employees; and lessee . . . hereby agrees to indemnify and hold lessor . . . harmless from and against all claims, demands, liabilities, suits or actions . . . for such loss . . .

53 Wis. 2d at 73-74, 191 N.W.2d at 848.

In response to the lessee's claim that the lease was not ambiguous, and therefore not subject to construction, the court noted that the nature of the indemnity agreement itself, and not the existence of ambiguity, prompted the rule of strict construction. Furthermore, this lease agreement did specifically contemplate such indemnification and the indemnitee could recover for any liability incurred by its own negligence.

bined with *Mustas* and *Anaconda*, create a double standard for interpreting indemnification provisions: in a construction contract the court required an express provision to secure indemnification of an indemnitee for his own acts, and in a lease agreement which also requires the indemnitor to procure insurance, the court required a more general interpretation of the parties' intent. This ambiguity suggests an interesting problem: what is the effect of adding to a hold-harmless clause in a construction contract a clause that requires the subcontractor to procure public liability insurance to protect the indemnitee?

Brown v. Wisconsin Natural Gas Co.,²⁴ involved exactly such a provision in a contractor/subcontractor service contract. The plaintiff was injured in his home by a natural gas explosion caused by a leaking gas main. The Wisconsin Telephone Company was laying underground telephone cables near the plaintiff's home and hired Kenneth MacDonald to perform the digging operations. He subcontracted the trenching work to his brother, Thomas MacDonald, who was inexperienced in the operation of the trenching machine. The new telephone line was laid parallel to the Wisconsin Gas Company's main line. As a result, the trenching exposed the lateral gas lines. During the trenching, MacDonald damaged seven of the thirteen exposed laterals, which the Wisconsin Natural Gas Company failed to repair. The trial court found the Wisconsin Natural Gas Company twenty-five percent negligent, the Telephone Company fifty percent negligent, Kenneth MacDonald ten percent negligent and Thomas MacDonald fifteen percent negligent. The Wisconsin Telephone Company, however, claimed to be fully indemnified for its portion of negligence as a result of its subcontract with Kenneth MacDonald, which read:

The Contractor assumes full responsibility for all injuries to, or death of any persons and for damages to property, including property and services of the Company, and for all claims, losses or expenses which may in any way arise out of the performance of the work, whether caused by negligence or otherwise, and the Contractor shall indemnify and save the Company harmless from all claims, losses, expenses or suits for such injuries, death or damages, and from all liens, losses, expenses or claims of any sort which may arise out of the performance of the work, and shall defend, on behalf of the

24. 59 Wis. 2d 334, 208 N.W.2d 769 (1973).

Company, any suit brought against the Company for any such damage, injury or death and shall reimburse the Company for attorney's fees and for all other expenses incurred by the Company in connection with or as a result of any such suit. *The Company may require the Contractor, at the Contractor's own expense, to take out and maintain such public liability and Workmen's Compensation insurance as will provide adequate protection against all such claims and demands.* Certificates of such insurance shall, at the request of the Company, be filed with it.²⁵

The court held that this contract failed to indemnify the Telephone Company against its own negligence, because the contract did not expressly contain such a provision. Despite the contract's repeated reference to "all claims" and "all losses," the court held that the maximum liability of the indemnitee indemnifiable under the contract was liability vicariously incurred because of the indemnitor's negligence.

In addition, the Telephone Company unsuccessfully claimed to be entitled to indemnification under common law principles, irrespective of the contract, based on a "duty of agents to indemnify their principals for liability the latter incur due to the agent's negligence or other breach of legal duty."²⁶ The court rejected this argument because the apportionment of negligence attributed to the Telephone Company resulted from their own breach of supervisory duties and was not vicariously incurred as a result of the agency relationship.

The judicial analysis in *Brown* did not differ significantly from that in *Anaconda* or *Mustas*. It is noteworthy, however, that the court made no reference to the insurance provision present in the *Brown* contract, even though the court was obviously cognizant of the importance of this provision, since it cited *Herchelroth* to support the validity of indemnity contracts in general. The contract itself granted the Telephone Company the option to require both public liability and worker's compensation insurance; however, the decision does not state if such insurance was ever procured.

Because the court failed to resolve the insurance clause question, several interpretations of *Brown* are possible: First, the indemnitee's option to require insurance in a construction

25. *Id.* at 352, 208 N.W.2d at 778-79 (emphasis supplied).

26. *Id.* at 354, 208 N.W.2d at 779.

contract has no bearing upon the indemnification agreement; second, the indemnitee's failure to request the insurance (if in fact such was the case) made the optional provision surplusage; or third, the presence of an insurance requirement, whether optional or not, has no bearing in a construction contract as opposed to a lease, because of the different relationships of the parties and the greater potential liability present in the construction situation. The third interpretation, in effect, distinguishes a construction contract situation from the lease situation in *Herchelroth* and *Hastreiter*, just as the court attempted to do in those two decisions.

Faced with these potential interpretations of *Brown*, in *Bialas v. Portage County* the court decided to ignore them all.²⁷ In *Bialas*, the Wisconsin Department of Transportation contracted with Portage County to repair a state highway. Thomas Gross, an inspector for the state, together with Portage County employees, removed a building from the highway right-of-way by burning it. After Gross left the scene, the fire spread and destroyed the plaintiff's barn. Gross was held seventy-three percent negligent and Portage County twenty-seven percent negligent. The state cross complained against Portage County, claiming full indemnification by the following contract language:

The contractor [Portage County] and his surety shall indemnify and save harmless the State, its officers and employees, from all suits, actions or claims of any character brought because of any injuries or damages received or sustained by any person, persons, or property on account of the operations of the said contractor; or on account of or in consequence of any neglect in safeguarding the work, or through use of unacceptable materials in constructing the work; or because of any act or omission, neglect or misconduct of said contractor; . . . or from any claims or amounts arising or recovered under the Workmen's Compensation Law . . . [t]he contractor shall also comply with all of the above requirements indemnifying and saving harmless the county, town, or municipality in which the improvement is made and each of them separately or jointly and their officers and employees . . . *It shall be the contractor's responsibility to see that all of the contract operations incident to the completion of his contract are*

27. 70 Wis. 2d 910, 236 N.W.2d 18 (1975).

covered by public liability and property damage liability insurance in order that the general public or any representative of the contracting authority may have recourse against a responsible party for injuries or damages sustained as a result of said contract operations. This requirement shall apply with equal force, whether the work is performed by the contractor, or by a subcontractor or by anyone directly or indirectly employed by either of them.²⁸

The state relied upon *Herchelroth* and *Hastreiter* in arguing that the requirement of insurance evidenced an intent to indemnify fully the indemnitee, and that if the indemnity clause was limited to indemnifying the acts or omissions of the contractor, it could not be harmonized with the insurance requirement which was intended to fully indemnify the indemnitee. The court rejected this contention. The insurance requirement in this contract was for a "separate, distinct, and stated purpose," namely, to assure the general public or any representative of the contracting authority recourse against a solvent defendant. Therefore, in contrast to *Herchelroth* and *Hastreiter*, *Bialas* holds that the insurance provision here has another meaning other than protecting the indemnitee against his own negligence, *i.e.*, protecting the general public and the contractor from an insolvent subcontractor. The indemnity provision can be strictly construed, and the refusal to indemnify the indemnitee against his own negligence does not render either clause useless in light of the other.

In *Bialas*, the court indicated that this case was controlled by and analogous to both *Young v. Anaconda American Brass* (despite its total absence of an insurance requirement) and *Brown v. Wisconsin Natural Gas Co.* (where the insurance provision was not even mentioned). Therefore, the indemnitee, Wisconsin Department of Transportation, could not obtain indemnification for its employee's acts or omissions, since an express contract provision to this effect was not present. The court concluded that "[u]nder the uniform holdings of this court, an obligation to indemnify under those circumstances will not be found by implication; and, at the most, the insurance provision only arguably implies such an obligation."²⁹

28. *Id.* at 913-14, 236 N.W.2d at 20 (emphasis supplied).

29. *Id.* at 918, 236 N.W.2d at 23.

Bialas seems clearly to indicate that in Wisconsin, a construction contract which does not expressly indemnify the indemnitee for his own negligence will be strictly construed to prohibit such a result. Adding a provision that the indemnitor purchase public liability insurance will not alter that strict construction if the court can find either a stated or implied purpose for the insurance other than merely to protect the indemnitee against his own negligence. The *Brown* decision did not mention a separate purpose for the insurance; *Bialas* placed great emphasis on the existence of a separate purpose, although the case falls short of requiring an express provision in the contract to that effect.

As a result of *Bialas*, if a contract contains both an indemnity provision and an insurance requirement, the indemnitor must show a separate purpose for the insurance requirement to avoid falling under the *Herchelroth* and *Hastreiter* standard which reconciles the insurance requirement with the indemnity provision to provide full indemnification of the indemnitee.

IV. ANALYZING A CONSTRUCTION CONTRACT

In light of Wisconsin law, the subcontractor-indemnitor under a standard construction contract, containing both an indemnity provision and an insurance requirement, can limit its indemnification liability only by showing that the insurance requirement has some purpose other than fully protecting the indemnitee against his own negligence. If it does have such a separate purpose, then the indemnity provision is not rendered useless, prohibiting indemnification of the indemnitee against his own negligence.³⁰

The subcontractor-indemnitor may utilize four arguments in favor of a strict construction of the contract. First, the subcontractor will typically be given a contract prepared by the general contractor, that is, an adhesion contract. Any ambiguity in an adhesion contract must be construed against the party preparing it.³¹ This rule of construction of adhesion contracts, combined with the *Mustas* rule of strict construction of in-

30. 4 AM. JUR. LEGAL FORMS 2d, *Building and Construction Contracts*, §§ 47:134, 47:244, 47:249, 47:250 (1971); 3 MODERN LEGAL FORMS, *Building Contracts*, §§ 1650, 1650.1, 1650.2, 1650.3, 1650.4, 1651.1 (1963); 2 NICHOLS, *CYCLOPEDIA OF LEGAL FORMS ANNOTATED, Building and Construction Contracts*, §§ 2.1210, 2.1211, 2.1134 (1971).

31. *Garriguenc v. Love*, 67 Wis. 2d 130, 226 N.W.2d 414 (1975); *Kuranda v. O'Connor*, 23 Wis. 2d 51, 126 N.W.2d 568 (1964).

demnity contracts and the requirement of an express provision for indemnification for the indemnitee's own negligence, imposes a heavy burden on the indemnitee to show that the contract evidences an intent to indemnify him for his own negligent acts and omissions. Generalized contract language, which encompasses a variety of potential liabilities, will not satisfy the specificity requirements of *Mustas*, *Anaconda*, *Brown* and *Bialas*.

Second, the two cases which allowed full indemnification, *Hastreiter* and *Herchelroth*, both involved leases rather than construction contracts. In *Herchelroth*, the court made an attempt to distinguish *Mustas* on its facts without indicating its reasons for doing so.³² The only real distinction between the lease and the construction contract lies in the potential liability of the indemnitor. The landlord-indemnitee gives up control of the premises to the tenant and remains liable under the safe place statute only for structural defects and for failures to repair.³³ On a construction site, however, the owner, general contractor and subcontractor can be liable under the safe place statute, depending upon who retains the right of supervision and control.³⁴

In a lease, an insurance requirement, combined with an indemnity agreement, is therefore construed to protect the lessor-indemnitee against his own acts of negligence, because the duties of the parties are distinctly outlined once the lessor gives up possession. Because the lessor is not liable for the acts of the tenant, a lease requiring the tenant to provide insurance protecting the landlord can only intend to indemnify the land-

32. 36 Wis. 2d at 146, 153 N.W.2d at 9.

33. *McNally v. Goodenough*, 5 Wis. 2d 293, 92 N.W.2d 890 (1958).

34. Wis. STAT. § 101.11 (1973); *Barth v. Downey Co.*, 71 Wis. 2d 775, 239 N.W.2d 92 (1976); *Johansen v. Woboril*, 260 Wis. 341, 51 N.W.2d 53 (1952) (control of the premises need not be exclusive); *Potter v. Kenosha*, 268 Wis. 361, 372, 68 N.W.2d 4, 10 (1955) which states in regard to control of the premises:

We are constrained to hold that when an owner turns over to an independent contractor the complete control and custody of a safe place, whereon or whereunder the contractor creates a place of employment for the purpose of fulfilling the terms of the contract, the owner reserving no right of supervision or control of the work excepting that of inspection or to change the plan with reference to the construction to be furnished, if thereafter in the performance of the work under the contract the premises are changed by the contractor and as a result a hazardous condition is created, the owner does not become liable to the contractor's employee injured as a consequence of such hazardous condition while acting in the scope of his employment.

lord against his own negligence, since he is not liable for any negligent acts of the tenant.

Conversely, on the construction site, it is likely that the subcontractor will be working in areas occupied by any number of parties, including the general contractor, other subcontractors or the general public. As a result, liability can be incurred by several parties to frequenters or employees over whom they have little, if any, control. In fact, on a construction site, exposure to liability is correspondingly greater because of the overlapping duties. The greater exposure to liability may explain the court's hesitancy to expand one party's liability to cover another's negligence.

Third, if the court allows the general contractor (or the owner, as the case may be) to be fully indemnified against his own liability, the general contractor or owner could benignly neglect his safe place duty, assured of full indemnity by the subcontractor insurer.

Finally, the subcontractor should argue that an insurance requirement in the construction contract does have a separate purpose, whether stated or not, which must be considered in conjunction with the strictly construed indemnity provision.

In Wisconsin, because many different parties exercise control over the construction site, there is a strong likelihood of shared or joint liability, as is illustrated by *Mustas, Anaconda, Brown* and *Bialas*. Frequently, the injured party is an employee of the subcontractor.³⁵ In Wisconsin, every defendant who is found liable to the plaintiff is liable for the entire judgment, not just that portion of the negligence attributed to the defendant.³⁶ Normally, an action for contribution reduces the inequity of this rule, giving the defendant who pays the right to reimbursement for that portion of negligence allocable to the other defendants.

35. See, e.g., *Young v. Anaconda American Brass*, 43 Wis. 2d 36, 168 N.W. 2d 112 (1969); *Mustas v. Inland Const. Co.*, 19 Wis. 2d 194, 120 N.W. 2d 95 (1963); *Hartford Accident & Indem. Co. v. Worden-Allen Co.*, 238 Wis. 124, 297 N.W. 436 (1941).

36. *Fitzgerald v. Badger State Mut. Cas. Co.*, 67 Wis. 2d 321, 227 N.W.2d 444 (1975); *Caldwell v. Piggly-Wiggly Madison Co.*, 32 Wis. 2d 447, 145 N.W.2d 745 (1966); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); *Farmer's Mut. Auto Ins. Co. v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 512, 99 N.W.2d 746 (1959). Of course, a joint tortfeasor who is liable for all or any part of the judgment is not liable for that portion of contributory negligence attributed to the plaintiff.

However, in Wisconsin a third party joint tortfeasor is not entitled to contribution from a negligent employer of the plaintiff injured in the course of his employment.³⁷ The employer's sole monetary liability to the employee is determined under the Worker's Compensation Act.³⁸ The employer is strictly liable to the employee for any injury incurred in the course of his employment, but is insulated by the statute from claims for contribution by third-party joint tortfeasors.³⁹ However, even though the employer is not liable to the employee beyond the worker's compensation award, his negligence is computed by the jury because a fair apportionment of third party negligence can only be obtained by a consideration of all the causal negligence contributing to the plaintiff's injuries.⁴⁰

As a result of the Wisconsin method of computation of damages, if the injured plaintiff is an employee of the subcontractor, that subcontractor's liability is limited to the extent of the worker's compensation payment. If the plaintiff subsequently recovers damages in a third party action against the general contractor, then, regardless of the apportionment of damages to the subcontractor, the general contractor will be held liable for all of the damages and will be barred from seeking contribution from the negligent subcontractor.⁴¹

37. WIS. STAT. § 102.03(2) (1973), *as amended by* 1975 Wis. Laws, ch. 147, § 54(1): Where such conditions [of liability] exist the right to the recovery of compensation pursuant to this chapter shall be the exclusive remedy against the employer and the worker's compensation insurance carrier.

38. *Globig v. Greene & Gust Co.*, 201 F. Supp. 945 (E.D. Wis. 1962); *Lampada v. State Sand & Gravel Co.*, 58 Wis. 2d 315, 206 N.W.2d 138 (1973); *Wisconsin Power & Light Co. v. Dean*, 275 Wis. 236, 81 N.W.2d 486 (1957); *Buggs v. Wolff*, 201 Wis. 533, 230 N.W. 621 (1930).

39. In addition to the employer's protection from contribution, the employer's worker's compensation insurer is entitled under WIS. STAT. § 102.29(1) (1975) to reimbursement of policy payments from any negligent party, regardless of the degree of liability attributed to the insured employee.

40. *Connar v. West-Shore Equip. of Milwaukee, Inc.*, 68 Wis. 2d 42, 227 N.W.2d 660 (1975). The inclusion of the employer's negligence could result in such a reduction of the negligence allocated to the third party that the plaintiff's contributory negligence might bar recovery.

41. The inequality of denying the third party joint tortfeasor's recovery from the negligent employer was raised in *Susspan Eng. & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4 (Fla. 1975). The Florida Supreme Court held that by denying the third party tortfeasor any action in contribution against the negligent employer, the Florida Workmen's Compensation Statute, FLA. STAT. § 440.11 (1972), violated the due process and equal protection clauses of the fourteenth amendment because it arbitrarily prevented the third party tortfeasor's constitutionally guaranteed access to the courts.

Nevertheless, the subcontractor's statutorily limited liability may be contravened by contract,⁴² and, therefore, an indemnity provision in the subcontract allows the general contractor to recover that portion of negligence allocated to the subcontractor. In effect, this contract provision allows the contractor to circumvent the prohibition of the worker's compensation law against contribution.

By protecting the joint tortfeasor-general contractor from sole liability to the subcontractor's injured employee, the indemnity provision in the contract has an independent meaning even if construed strictly and held not to indemnify the indemnitee for his own negligence. Likewise, the insurance requirement independently assures the general contractor of the subcontractor's solvency and allows him to recover either contribution or indemnity as the situation requires. Each clause has a separate purpose and, when read together, complement each other without resulting in indemnification of the indemnitee against his own negligence.

To overcome the subcontractor's attempt to limit his indemnification liability, the general contractor-indemnitee should rely on *Herchelroth* and *Hastreiter* for the proposition that a strictly construed indemnity provision has no meaning when read in light of the insurance requirement. However, given the court's reluctance to allow a party to avoid liability for his own negligent acts, this argument is weak. The general contractor's best course of action lies in preventing the issue from ever arising by drafting an express statement of complete indemnification into the contract.

Confronted with a contract purporting to indemnify the indemnitee against his own negligence, the subcontractor faces a difficult problem if the contract also contains a clause requiring the subcontractor to purchase liability insurance. The Wisconsin Supreme Court has muddled the clear rule of strict construction adopted in *Mustas* by utilizing a more liberal

See also *Wisconsin Power & Light Co. v. Dean*, 275 Wis. 236, 81 N.W. 2d 486 (1957), where the plaintiff argued that statutory denial of contribution rights was a deprivation of the third party tortfeasor's property without due process of law. The court refused to deal with the issue because plaintiff raised it for the first time on appeal and therefore waived it.

42. *Hintz v. Darling Freight, Inc.*, 17 Wis. 2d 376, 117 N.W.2d 271 (1962); *A. O. Smith Corp. v. Associated Sales & Bag Co.*, 16 Wis. 2d 145, 113 N.W.2d 562 (1962); *Huck v. Chicago, St. P., M. & O. Ry.*, 5 Wis. 2d 124, 92 N.W.2d 349 (1958).

standard to determine the intent of the leases involved in *Herchelroth* and *Hastreiter*. That liberal standard was partially applied to construction cases in *Bialas*. In *Bialas* the court added to the rule of strict construction by implicitly adopting a separate purpose requirement for the insurance provision in distinguishing *Bialas* from the lease cases on the basis of the stated purpose of the insurance provision. This requirement necessitates the above recommended analysis in order for the subcontractor to show the existence of a separate purpose for the insurance provision. Thus, when the contract contains an insurance provision, a separate purpose for the provision is an added requirement to the heretofore unqualified rule that indemnity clauses will not be held to indemnify the indemnitee against his own negligent acts absent an express statement to that effect. By negative inference, *Bialas* leads to the conclusion that if the subcontractor fails to show a separate purpose for the insurance, then the contract will be construed to indemnify fully the indemnitee, despite the absence of an express provision to that effect. Yet such an interpretation is unsatisfactory on the basis of the two cases involving leases, both of which the court itself attempted to distinguish on the facts. Hopefully, at its next opportunity, the court will return to the precedent established in the early construction cases of construing the contract strictly and of requiring an express intention to provide for full indemnity of the indemnitee.

ROSS A. ANDERSON